No. 2722

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

WILLIAM HANLEY,
Appellant,

vs.

PACIFIC LIVE STOCK COMPANY
(a corporation),
Appellee.

APPELLEE'S PETITION FOR A REHEARING.

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Solicitors for Appellee and Petitioner.

Filed this.....day of July, 1916.

FRANK D. MONCKTON, Clerk.

By.....Deputy Clerk.

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To the Honorable William B. Gilbert, Presiding Judge, and the Associate Judges of the United States Circuit Court of Appeals for the Ninth Circuit:

The Pacific Live Stock Company (a corporation), appellee, in the above entitled matter, respectfully petitions for a rehearing in the above entitled cause, and in support thereof submits the following for the consideration of the court.

I.

THE LUIG DAM WAS USED FOR THE IRRIGATION OF THE LUIG LAND IN VIOLATION OF THE DECREE.

The simple, unvarnished facts in regard to this matter are: That by the final decree Luig was per-

mitted to use this dam for the irrigation of his land during certain times of the year, and was enjoined from using it at any other time. Notwithstanding that, in the year 1915, all of the boards were placed in the dam, and by means thereof practically all of the water of the river was diverted *onto the Luig land.* There can be no doubt that if Luig had done this it would have been a clear violation of the decree and a contempt of court. It is also clear that if Hanley, or any one else, had assisted Luig in thus diverting the water onto his land in violation of the decree he would likewise be guilty of contempt of court for so doing, but it appeared that although the water was almost lapping the doorstep of Luig's house, he was conveniently away at his summer house during this period, so that if he did have anything to do with it it could not be proved, and instead of Hanley merely assisting him in doing this, it appeared, without dispute, that Hanley had done it entirely himself. Now, we respectfully ask the court how it can be less a contempt of court for Hanley to use this dam for the irrigation of Luig's land in direct violation of the terms of the decree, where he does it entirely alone, than it would be if he did it with the assistance of Luig. In other words, the use of that dam for the irrigation of the Luig land was forbidden during this period. Hanley was a party to the suit, and was aware of the decree. Notwithstanding those facts, he deliberately turns all of the water of the west fork of the river onto the very Luig land which is forbidden to use it during that period,

is held by the Circuit Court to be guilty of contempt of court for so doing, and still this court holds that such an act does not constitute a contempt of court. If such a proposition is maintainable, then all Luig has to do in any year is to go away to the country in the summer-time, and any obliging neighbor, whether it be Hanley or anyone else, may turn all of the water of the west fork of the river onto that land and be absolutely beyond the reach of the court. If this can be done in 1915, it can be done in any other year. If it can be done in April, it can be done in March or May, or any other time during which the decree prohibits it from being done. In other words, there is nothing in any case that could be proved any stronger than what was proved in this case. It was proved that the Circuit Court had forbidden the use of that dam to divert water of the west fork of Silvies river onto the Luig land during that time of the year. It was proved that the dam was used for the purpose of diverting practically all of the water of the river during that period onto that land. It was proved that this was done by Hanley, who was not only a party to, but had knowledge of that decree, and still this court reverses a decree of the trial court holding him guilty of violating the decree in doing what he was shown to have done. These, we respectfully submit, are the only relevant or material facts in this matter, and that they do constitute a contempt of court and a violation of the decree we respectfully submit is too clear for serious argument.

II.

JUSTIFICATION RELIED ON FOR THIS VIOLATION.

Let us, however, briefly examine the justification for this violation of the decree. Hanley says that he owned certain land formerly belonging to one Altschul, which has water rights, and that also in connection with that land he has an interest in the Luig dam. Let us suppose for the sake of the argument that this is so. What justification was that for turning all of the water of the west fork of Silvies river *onto the Luig land?* Certainly none whatever. We do not claim that any water right which Altschul might have been entitled to as the owner of that land has in any way been affected by this decree, but there is not a suggestion aywhere in the case that Altschul ever had any interest in the Luig dam or ever was nearer to it than his office on Sansome Street in San Francisco. There is no suggestion in the record that Altschul ever diverted a drop of water from Silvies river, but Hanley says that he (Hanley) has an interest in the Luig dam, and had it prior to the commencement of the suit in which the decree involved herein was entered; but his own evidence showed that it was entirely a different dam that he attempted to claim an interest in at that time. Luig testified that he (Hanley) had no interest in the Luig dam until it was rebuilt about 1904, long after the decree in this case, and Luig, Gilcrest and Newman all testified that Hanley had never used the dam since the decree, and that it never had been used except in strict accordance with the decree, and the trial court held that Hanley had no interest whatever in the dam at the time of the former suit. Still this court

undertakes to disregard all of this testimony and to apparently hold that Hanley did have an interest in the dam at the time the suit was commenced, and this notwithstanding the well-established rule that in contempt proceedings the findings of the lower court will not be disturbed where there is a conflict of evidence.

Besette v. W. B. Conkey Co., 194 U. S. 234; 24 Sup. Ct. 665; 48 L. ed. 997.

But we respectfully submit that whether Hanley did or did not have any interest in the Luig dam at the time of the decree, in connection with his land in section 31, is a matter in no way involved in this proceeding. Hanley was shown to have put the boards in this dam and in violation of the decree diverted the water onto the land of Luig, and whether he did or did not have any right to use this dam for the irrigation of section 31 is entirely immaterial, because that would be no justification for using the dam in violation of the decree to irrigate the land of Luig which was forbidden to use it during that period, and consequently even if he did have any rights by reason of his lease or ownership of section 31 this would be no justification whatever for the violation of the decree actually committed. Whether or not he had any right to the waters of the river by virtue of his ownership of section 31 is a matter not necessary to a decision in this case.

III.

EFFECT OF FORMER DECREE AS RES ADJUDICATA.

One of the strongest reasons for the conclusion that Hanley had no interest in the Luig dam at the time of

the commencement of the former suit is that he did not set it up in that suit, but this court not only disregards that consideration, but also holds that his failure to set it up did not bar him, and this is based on a radical misstatement of the record in the previous case to the effect that the complaint in the previous case only attacked the diversions made by Hanley on the east fork of the river. What are the facts? The complaint in that action alleged that the plaintiff's lands were situated along the main channel of the east and west forks of Silvies river, and that the water thereof when unobstructed flowed through those lands and was used for its irrigation (Printed complaint, p. 1061); alleged that it was entitled to have the waters of Silvies river flow down its main channel and through the forks, branches, minor channels, sloughs and swales thereof down to its lands as it would flow if not obstructed or diverted (Printed complaint, p. 1113); alleged

> "But notwithstanding your orator's said rights the defendants have wrongfully entered upon the channels of said river *and the channels of its said forks* above said lands of your orator, or some of them, and have wrongfully constructed and are now wrongfully maintaining divers dams in said channels and ditches leading therefrom; that is to say, The Harney Valley Dam, Ditch and Irrigating Company has one dam and two ditches leading therefrom; George Whiting, Thomas Whiting, Ione Whiting and John C. Foley, acting together, have one dam; N. Brown has one dam and one ditch leading therefrom; J. H. Byerly and C. P. Rutherford acting together have one dam; C. P. Rutherford has one dam and one ditch leading therefrom; C. A. Sweek has one dam and one ditch leading therefrom; M. Cushing, D. M. McMenamy and John I. Newman acting together have one dam and two

ditches leading therefrom; William D. Hanley has one dam and three ditches leading therefrom; W. H. Marrs and Manna Marrs acting together have one dam and one ditch leading therefrom; Joseph T. Barnes has one dam and one ditch leading therefrom; William Clark has one dam; F. L. Mace has one dam and one ditch leading therefrom; H. C. Levens has one dam and two ditches leading therefrom; George W. Young, Mrs. A. E. Young, Hull Hotchkiss and C. T. Voegtly acting together have one dam and one ditch leading therefrom; Green Hudspeth, James Dalton and Hull Hotchkiss acting together have one dam and one ditch leading therefrom; Casper Luig has one dam; Mrs. F. E. McGee has one dam; and Peter Clemens and B. R. Porter acting together have one dam and one ditch leading therefrom" (Printed Complaint, pp. 1113-14).

It will be seen from the above that the defendants were charged generally with diverting water from both the east and west forks of the river, and there was no statement whatever made that the diversions which were made by W. D. Hanley were made from the east or the west fork, nor was there any statement that the dam and ditches which were referred to were situated upon the east fork. The court, therefore, is in fundamental error in accepting the statement of the appellant that the complaint only charged him with respect to the east fork of the river.

The prayer for a discovery was as follows:

"your orator asks that they may each be compelled to make answer to this, its bill of complaint, and to make a full disclosure and discovery in regard to the rights or pretended rights, if any they have, for diverting the waters from your orator's said lands and obstructing its flow therein, as is hereinabove charged, and that they may each, according to the best and utmost of their knowledge, remem-

> brance, information and belief, make full, true, direct and perfect answer to the matters hereinabove stated and charged."

The matters stated and charged in the bill were that the defendants had wrongfully "entered upon the channels of said river and the channels of its said forks". The prayer for an injunction was as follows:

> "That your honors may be pleased to enter a decree in this cause perpetually enjoining and restraining the said defendants and each of them, their attorneys, agents, servants and employees, from diverting any of the water of Silvies river *or the east or west fork thereof* from their channels or impeding the flow of any of said water down to and upon your orator's said lands as said water has heretofore been wont to flow therein when not interfered with by the defendants, and that said defendants and each of them may be required to remove their said dams from the channels of Silvies river *and said forks thereof* and may be perpetually enjoined and restrained from rebuilding the same *or in any manner obstructing the flow of said water*" (Printed Complaint, pp. 1116-17).

It will be seen from this that an injunction was asked generally against the defendants from diverting any water from Silvies river or the east fork or the west fork thereof, and no one could read the complaint without knowing that his right to divert any water from the main channel of Silvies river or from the east fork thereof or the west fork thereof was questioned and was about to be enjoined. The defendant, W. D. Hanley, subject to certain rights which were awarded him, stipulated that

"the complainant shall have a decree in this suit according to the prayer of its complaint" (Printed decree, p. 1144),

and subject to those rights the final decree contained the following provision:

"That the defendants W. D. Hanley * * * and each and all of them and the attorneys, agents, servants and employees of them, and the attorneys, agents, servants and employees of each of them, be and they and each of them are perpetually enjoined and restrained and strictly inhibited from diverting any of the water of Silvies river *and any of the water from the east fork of Silvies river and any of the water from the west fork of Silvies river* from the channels of said rivers and from the channels of each of said rivers, and that they be and they and each of them are perpetually enjoined and restrained and strictly inhibited from impeding the flow of any of said water to and upon the lands of the complainant hereinbefore described as the said water has heretofore been wont to flow thereon when not interfered with by the said defendants and by the said intervenor, either jointly or severally, and that they be and they are and that each of them be and he is required to remove all and any dams which they or either of them may have, or which any one of them may have, in the channels of Silvies river *or in the channels of the east fork of Silvies river or in the channels of the west fork of Silvies river,* and that they be and they are and that each of them be and each of them is hereby perpetually enjoined and restrained and strictly inhibited from rebuilding the same, or any thereof; and that they be and they are and that each of them be and each of them hereby is perpetually enjoined and restrained and strictly inhibited from *in any manner* obstructing the flow of the waters of Silvies river and from in any manner obstructing the flow of the waters of the *east fork* thereof and from in any manner obstructing the

> flow of the waters in the *west fork* thereof, and from obstructing the flow of the waters of said rivers, or any thereof, in all and in each of the channels thereof, save and except as is in this decree more particularly set forth'' (Printed decree, pp. 1180-1181).

It therefore appears that the plaintiff's lands were traversed by the east fork and the west fork of Silvies river and through the same received the waters of the main channel of Silvies river, the waters of the west fork and the waters of the east fork. It alleged that it was entitled to have said waters flow unobstructed to its lands. It charged the defendants generally with obstructing such waters; it prayed specifically that each of them be enjoined from obstructing the waters of the main channel or of the east fork or of the west fork; it was decreed that the defendants be enjoined from obstructing the waters of the east fork or the west fork except in the manner expressly permitted by the decree, and it was expressly provided that the waters of Silvies river and the waters of the west fork and the waters of the east fork, and the waters in any of the channels of Silvies river, could be used by the defendant only as in the decree set forth.

The propriety of a decree covering the whole river and all of its forks can not be questioned. The intention to cover the main river and both of its forks is so clear as not to admit of doubt. The decree by the clearest language did cover both forks of the river as well as the main river as to all the defendants, and still the decree is held not to apply to the west fork of Silvies river, all on the mistaken assumption that the complaint

did not involve the right of all of the defendants on both forks. This conclusion is attempted to be supported by the fact that after the general allegations that the defendants were obstructing the waters of the main river and of the east and west forks, the complaint specified the number of dams and ditches which were owned by various defendants; but there is nothing in the complaint that alleges on which forks those dams and ditches were situated, and it would be a strange proposition if a defendant could default to such a complaint and could then say that the judgment was only an adjudication as to the dam which he did have, but was not an adjudication as to a dam which he did not have, and that he could, therefore, immediately build another dam and it would not be covered by the complaint. How can the court say that the complaint referred to a dam on the east fork rather than to a dam on the west fork? But suppose the plaintiffs had only known of one dam owned by Hanley and had clearly designated and described it as being at some particular place or on some particular fork, would the court mean to hold that a decree that he be enjoined from obstructing the water by any dam or by any ditch at any place would be of no effect except as to the particular dam or the particular ditch that was specified in the complaint? Certainly not. The complaint sought to have the defendants enjoined from interfering with the water in any manner, or at any place, or by any dam, or any ditch. The plaintiff was undoubtedly entitled to that relief, unless the defendants appeared and justified by alleging themselves not only the ownership of some

dam or ditch, but by alleging and establishing a right to maintain it. We are now taking the position that W. D. Hanley did as a matter of fact own only one dam at the time of the decree, and it is true that we are taking the position now that the only dam he owned was in the east fork, but the court says we can not take that position because, forsooth, in the former suit we did not allege the fact that he owned a dam in the west fork. We claim he did not own a dam in the west fork. We claim that the evidence in this case shows he did not own any dam in the west fork, and how can our prayer that he be enjoined from diverting the water of the east fork or the west fork or the main channel be limited because we did not allege that he owned something which we even now claim he did not own, and certainly never knew of his claiming to own prior to the present contempt proceeding? The purpose of that suit was to compel each of the defendants to set forth any right which they had in and to the waters of the east fork or the west fork or the main channel of the river, but, as the court now construes it, any defendant can put as many dams in the channels of Silvies river, or any of the forks thereof, and maintain them as they see fit, provided they are not the particular dams specifically referred to in the complaint. Such a result is simply to make an absurdity of the decree. It is obvious that the plaintiff in drawing the bill thought it knew the dams and ditches which the various defendants owned, and while it specified them so far as it did know them it asked a decree enjoining any diversion or any obstruction of the water of the river, but according

to the present decision this specification of certain obstructions destroyed the whole effect of the decree, which the court rendered and it results that no defendant is enjoined in any manner except in respect to the particular dams and ditches so specifically referred to. Such a construction makes the entire decree nugatory and of no force and effect whatever.

We respectfully submit that the entire decision on this subject is based on an erroneous acceptance of the statement of appellant that the east fork was not involved in the complaint and decree, but it is not only its effect upon this particular case that demands a further hearing in order to correct that error, but it is the effect that it will have upon the entire decree, for certainly each of the defendants is in exactly the same position as William D. Hanley; the dams of each were specified and to hold that the decree is nugatory as to him except as to the particular dam specified in the complaint would apply equally to each of the other defendants, and it would therefore result that the decree was of no force or effect whatever to prevent the defendants from obstructing the water in any way they saw fit, except by the dams so specifically mentioned. Such a conclusion is utterly unsupported by reason or authority. The complaint asked that the defendants be enjoined from diverting water from the main channel or from the east fork or from the west fork. The defendants consented to a decree enjoining them from diverting water from the west fork or diverting water from the east fork or from diverting water from the main channel. The jurisdiction of the court to enter

such a decree is undoubted because the parties appeared and consented to it, and even if by any possible construction the complaint could be held not to authorize such a decree, which we dispute, the court had full power to construe the complaint, and did construe it, and did enter such a decree upon the stipulation of the parties, and having full authority and jurisdiction to do so the decree can not be questioned at this date. We have said nothing of the injustice of permitting it to be questioned, but here it appears by the testimony in this case that for sixteen years since the entry of that decree it has been scrupulously carried out with respect to the Luig dam, which has been operated by Luig in strict accordance with the decree. In the meantime Caspar Luig has died, as appears by the record, and since the trial in this contempt matter his brother has likewise died, and the court can well believe, which is a fact, that other important witnesses have likewise died since that decree was entered. The purpose of that suit was to have the rights of the parties fixed and determined, and if Hanley did have an interest in the Luig dam at that time, and the decree was not binding upon him in respect thereto, the decree was an absurdity since Luig's use of the dam was limited only by the time it might be operated, and if Hanley could operate it all the rest of the time, it is obvious that the purpose sought by the stipulations, which became a part of the decree, never could be carried out. We say, therefore, that the trial judge was fully justified in holding that the claim of any right of Hanley in that dam prior to the decree is without foundation, and we moreover submit that that

decree necessarily enjoined him from using that dam, or any other dam, on the east or west forks of the river, except the dam which he was expressly permitted to use.

IV.

NO CLAIM OF ANY RIGHT ACQUIRED FROM ALTSCHUL.

The court makes some point of the fact that Altschul, the owner of certain land now owned by Hanley, was not made a party to the suit. It is sufficient to say that we do not claim that any right which Altschul had there as a riparian owner, or as an appropriator, has been in any way affected by the suit. If he had any right before the suit he had it afterwards, and if it has since passed to Hanley, he likewise owns it irrespective of this decree, but there is no claim that Altschul ever had any interest whatever in the Luig dam, or ever conveyed it to Hanley. Hanley's claim is that he (Hanley) owned an interest in it prior to that suit, and at the time it was instituted. We, furthermore, respectfully submit that none of these matters as to the water rights of Altschul or the water rights if any acquired by Hanley from him are in any way involved in this proceeding. What is involved in this proceeding is a use of the Luig dam for the irrigation of the Luig land in clear violation of this decree by a person who was a party to the decree and had knowledge of it.

V.

THE WHOLE RIVER WAS INVOLVED IN THE FORMER CASE.

The court make some point of the contention that the entire stream was not involved in the prior case.

This has been pretty well disposed of in the analysis of the complaint and decree, which has already been made. The complaint alleged that the plaintiff was entitled to the natural flow of the stream to its lands, unobstructed, both of the main channel, the east fork and the west fork, and sought to enjoin the defendants from interfering with such flow. It is, therefore, clear that as against the defendants the complainant did claim the full flow of the entire stream and as against them by the decree the court did enjoin them from interfering with the flow of any part of the stream to the complainant's land. We are at a loss to see how a case could more fully and clearly involve the entire stream so far as the parties thereto were concerned. In fact the last paragraph of the decree shows clearly that the decree was intended as an adjudication as to the waters of Silvies river and the waters of the west fork and the waters of the east fork thereof. That paragraph is as follows:

> "20. That this decree shall run in favor of the complainant, its successors and assigns, and against the defendants, their heirs, personal representatives, successors and assigns, and against each of the said defendants and the heirs, personal representatives, successors and assigns of each of said defendants; and against the complainant, its successors and assigns in favor of the said defendants, their heirs, personal representatives, successors and assigns; and that the water of Silvies River *and the waters of the west fork of Silvies River and the waters of the east fork of Silvies River* and the waters in any of the channels of said Silvies River and in any of the channels of the east fork thereof and in any of the channels of the west fork thereof may be used and enjoyed by the defendants only

as in this decree is particularly set forth, *and not otherwise,* and only at the times and in the places and for the purposes in this decree set forth, *and not otherwise.*"

VI.

USE BY HANLEY OF THE YOUNG DAM.

The decision of the court on this matter is even more startling than its decision of the matter of the Luig dam. The facts in regard to the Young dam are: that it was constructed by Young in the very teeth of the decree; the court in a previous contempt proceeding so held, and that it was so constructed is not open to dispute; notwithstanding this, in 1914 it was again used by Hotchkiss and Thornberg to irrigate their land, in clear violation of the decree. The court so held and directed these parties to remove the dam. They have not appealed and the court must assume that that direction has been carried out, as it in fact has been. Still, the court on the appeal of Hanley, holds that Hanley had a perfect right to use this dam. Let us see, therefore, how Hanley acquired any interest in it. His first version was, in his sworn answer, that he acquired it after it was constructed by Young and before he knew that it had been constructed in violation of the decree of the court. Of course from a legal standpoint this could not be so, because Hanley himself being a party to the decree and knowing all about it would at least have constructive notice that the dam was illegally constructed, but he afterwards entirely abandoned this contention and testified that after Young had been held to

have violated the decree in constructing it he purchased it from Young. The case, therefore, simply comes to this: that after a structure is built in violation of the terms of a decree and in contempt of court, the party constructing it may entirely avoid the consequences by turning it over to another party to the suit, who has full knowledge of the fact that it was illegally constructed. Certainly to assist one to maintain a dam illegally constructed is as much a contempt of court as to assist him to construct it, and if it was illegally constructed in contempt of court, the court certainly had power and authority to order it destroyed, and that was what was done in this case, and the court practically now holds that this was entirely wrong, and that Hanley could prevent its destruction by purchasing an interest in it with full knowledge that it had been declared by the court to be illegally constructed.

In the first place, there was no necessity for this court to pass on any such a matter. Hanley denied that he had used this dam and by means of that denial escaped a conviction for contempt on that particular count. Hotchkiss and Thornberg had used it and had used it in clear violation of the terms of the decree, and were, therefore, properly held guilty of contempt, and to say that the power of the court to carry out a decree by requiring the removal of a structure constructed in violation of the decree of the court can be circumvented by transferring the same to another party in the case, is, to our minds, so clearly unsustainable that we are satisfied it would not receive the conscious approval of this court.

Another version of this matter was that Hanley had assisted Young in the original construction of this dam. On this theory it therefore appears that Hanley assisted Young to construct this dam for the use of his (Young's) land, in admitted violation of the decree, and the court therefore certainly had authority to require Young to remove it, and Hanley, having assisted him to build it, in violation of the decree of which he had knowledge, can not complain of the order of the court requiring Young to remove it.

VII.

THE DRAIN DITCH.

The fundamental error which the court has committed in regard to this matter is in confusing the drainage of water from the surface of Hanley's land, however it may come upon it, with the diversion of water from the river into the Drain ditch. This matter is of such immense importance and any decision on it so far-reaching that we trust the court will not hastily affirm the decision which has been arrived at in respect thereto. The evidence in this case shows that in the year 1914, during the month of April, thirty feet of water was diverted through the Drain ditch. While the record does not show the full capacity of the ditch, it does show from the position of the boards in its head that this was nothing like the capacity of the ditch, and so far as the legal principle is concerned, it would be the same if the ditch had been wide opened, taking all of the water of the river, and if a contempt proceeeding for taking

thirty feet of water could not be maintained neither could a contempt proceeding for taking all of the water of the river be maintained. It has certainly been decided, at all events, that Hanley can not use the Drain ditch for the purpose of diverting water out of the river when it is unnecessary to do so in order to drain water from the Hanley lands (*Pacific Live Stock Co. v. Hanley,* 200 Fed. 468, 484). The court, in its opinion, says that the trial court did not find that this was the condition of affairs in 1915, but in this the court is in error, for the trial court did hold

> "That during the months of March and April, 1915, *and at times when it was unnecessary to drain water from the lands of William Hanley,* the said defendant, William Hanley, in violation of the terms of the said decree permitted the head of the Hanley Drain Ditch to be opened" etc. (Trans. p. 76).

Not only did the court so find, but the evidence showed, that during the very time that Hanley had the head of the Drain ditch open so that it would divert from the river at least thirty feet of water, he was himself diverting all of the water of the river, and of both forks, onto his land, for the purpose of irrigation. It therefore results that during the time when the Hanley land was being irrigated and all of the water of the river was being diverted for its irrigation, and that therefore it obviously needed irrigation and not drainage, Hanley was diverting thirty feet of water from the river into the Drain ditch. Now, if that was not a violation of the decree in this case, it necessarily follows that no diversion through the Drain ditch of water of the river at any time could be a violation of that decree, and it

therefore follows that Hanley with impunity can divert any quantity of water from the river into the Drain ditch during the irrigating season without violating this decree. This simply amounts to making the dissenting opinion of Judge Gilbert, reported in 200 Fed., p. 485, the prevailing decision of the court in this case.

In the answer of the defendant Hanley, in the original case, he refers to the Drain ditch as follows:

> "The same was built to be used and is used by this defendant solely for the purpose of draining water from certain of his land as above described and was not intended to be used, and never has been used by him for the purpose of irrigation; that there is no dam in connection with said ditch and that by draining the water off from his land through said ditch he prevents a large tract thereof from being so submerged with water as to render it valueless, and that thereby he is enabled to and does reclaim a large body of his land so that the same can and does produce abundant and valuable crops of wild grass every year, which is used for hay and pasturage by this defendant" (Trans. p. 10).

It will be seen that by this answer the defendant in no way alleged any appropriation of water by means of the Drain ditch, nor did he in any way claim a right to divert water from the river by means of it and of course the court well knows that he could not in law divert water from the river for the purpose of drainage. It is clear, therefore, that on such an answer he would not have been entitled to have justified any diversion of water from the stream. He therefore entered into a stipulation that the Drain ditch should be maintained "for the purpose of draining water from the *surface* of the land above described, and not for the

purpose of irrigation". It was certainly held in the former case in this court that he could not by means of the Drain ditch divert water from the river into the head of the Drain ditch

> "when its waters are not so high as to make it necessary or proper by means of the Drain ditch to drain surface waters from the lands specifically described in the eleventh subdivision of the original decree".

Certainly it can not be contended by any one that it is necessary or proper to drain water from the surface of the land when the owner of the land is by every means in his power endeavoring to divert water upon those lands for their irrigation. The court seems to entirely confuse the use of the Drain ditch for the drainage of water from the surface of the land into the same with the use of the Drain ditch for diverting water from the river. For instance, the court refers to the fact that the defendant had a right to use the Drain ditch for the purpose of draining from his land the water which legally went out either through the Upper Hanley ditch or otherwise. No one has ever disputed that proposition, nor has any one ever disputed his right to use that water in any way he sees fit on the land described in the decree, but the diversion of water from the river into the Drain ditch is quite a different proposition, and the effect of the present decision is that Hanley without let or hindrance can divert any quantity of water he sees fit, even to the whole river, through the Drain ditch, even during the period when he is himself diverting water from the river in the ditches which he is allowed to use for the purpose of

irrigating the land. The court makes a point that it was not specifically shown that this water so diverted was used for irrigation. What difference can that make to complainant? The water was diverted out of the river channel where the complainant was entitled to have it flow, and away from the lands to which complainant was entitled to and desired to have it flow. Whether it was used for irrigation or wasted or allowed to come back to the river some sixteen miles below, and far below places where the complainant would have diverted and used it, is an entirely immaterial proposition. At all events, the majority of this court in *Pacific Live Stock Co. v. Hanley,* 200 Fed. 468, 484, did hold that Hanley was in contempt of court for diverting water when it was not proper or necessary to do so for the purpose of draining water from the surface of the land, and the trial court in this proceeding held that he did, in 1914, divert water into the Drain ditch when it was unnecessary to drain water from the Hanley lands (Trans. p. 76). Still this court reverses that order which is in exact accord with the holding of this court on the former appeal.

Not only that, but on the trial of this case Hanley did not claim that during this period it was either necessary or proper for him to divert water through the Drain ditch and took the position in his sworn affidavit that he had not diverted any water through it at all during that period. We showed by evidence that was uncontroverted that he had diverted water during that period, and now this court undertakes to uphold his right to divert water through the Drain ditch at a

time when the trial court found on sufficient evidence that it was entirely improper, and during a time that he himself did not claim it was proper to divert the water by that means.

At all events, the decision of the court is based entirely on the unsupported premise that the trial court did not find that this water was diverted out of the river and into the Drain ditch at times when it was unnecessary to drain water from the lands of the defendant Hanley.

VIII.

CUTS IN THE BANK OF THE RIVER.

As to this matter this court assumes that these cuts were natural depressions and therefore there was no duty on Hanley's part to close them. Here, again, we respectfully submit that the court in so holding has disregarded the testimony of at least two witnesses as to the facts, and has also disregarded the admission of Hanley that he recognized that it was his duty to keep them closed. Griffing testified that these large cuts, diverting some fifty feet of water each, were artificial (Trans. pp. 97, 137-8). Gilcrest likewise testified that these cuts were artificial (Trans. pp. 164-170). Hanley, and all of his witnesses, showed that these cuts were equipped with poles, stakes, etc., for the purpose of controlling them, and Hanley tried in every way to show that he had kept them closed. Notwithstanding this testimony, this court now, by its decision, gives its permanent approval to leaving two of these cuts

open, each diverting fifty second feet of water. At the statutory duty of water of one cubic foot to eighty acres this water alone would irrigate eight thousand (8,000) acres of land, which is considerably more than all of the land owned by Hanley at the time of the entry of this decree. In other words, this court has permitted by its dismissal of this proceeding the maintenance of two cuts having all the appearance by the photographs and evidence of being artificial, testified by all the witnesses of the complainant to be artificial, and which the defendant himself has admitted he should have kept closed, and which he testified he did everything in his power to keep closed. This court, we say, has given its permanent approval to the right of the defendant to keep them open and to divert this or even greater quantities of water.

IX.

AS TO OBSTRUCTIONS IN THE TWENTY-ONE DAM.

This matter is not so important as the others, because not of permanent consequence. The evidence showed that these obstructions raised the water in the river about a foot (Trans. p. 96). It does not make any difference whether this water was diverted into the Twenty-one ditch or into the Hanley Upper ditch, or out through some cut or whether it was diverted at all. This obstruction in the channel was not permitted by the decree. The court on sufficient evidence found it to exist in violation of the decree, but the court disregards all of this evidence simply because of the general testimony that from the first of April until the 3rd of

May the *average* amount diverted into the Upper Hanley ditch "would be very close to forty second feet". In other words, because an engineer testified that during a period of over a month the *average* amount diverted was forty feet, therefore the court draws the conclusion that he testified that during all of that period the same amount was diverted every day, and therefore the same amount diverted after this obstruction was removed, as well as before. We certainly submit that no such a conclusion can be arrived at. The river during that period rises and falls, and the amount diverted into the ditch would rise and fall, and the witness simply testified that the *average* amount during that period would be a certain amount, which was an ordinary engineering expression, and does not mean that the same amount was diverted during the entire period. But what is the use of arguing such a matter when the court knows as a hydraulic matter that if you raise the water in a stream a foot immediately below the head of a ditch it will necessarily divert about a foot more depth of water in the ditch. Even if a witness had testified that notwithstanding the raise of a foot the same amount flowed in the ditch, his testimony could not be believed because it would be absolutely against all reason and nature, and certainly the court has no right to assume that the witness testified that the same amount flowed when he simply testified to the average amount during the entire period.

Again, we respectfully submit that such a conclusion is not arrived at by giving proper or just weight to the finding of the trial judge.

X.

GENERAL CONSIDERATIONS.

In the foregoing we have attempted to show that the court has based its decision on premises not supported by the record, but we can not expect a proper consideration of these important property rights if the court is to look at this matter in the manner indicated by the last paragraph of its decision. In this particular instance, at the only time in the year when the plaintiff is entitled under the terms of this decree to the waters of this river, the defendant W. D. Hanley was taking every drop of water of Silvies river. The plaintiff saw all of the water of the west fork of Silvies river put upon the lands of Luig, Thornberg and Hotchkiss, in express and direct violation of the decree. It saw all of the water of the east fork going out through the Drain ditch, the Upper Hanley ditch, and these cuts which Hanley claimed to control, but which were in fact entirely uncontrolled, beside being impeded by his dam, the abandoned timbers of his bridge, and by every artifice that could well be imagined, while the testimony shows that the complainant's lands were parched and dry; and still this court adds insult to injury by holding that in bringing this proceeding the complainant "has gone further than justice permitted" and "that it has magnified little things beyond their true proportions". In other words, the taking of all of the water of Silvies river at a time during which alone the complainant was entitled to receive it and putting it upon lands which were strictly inhibited from receiving it at that time, is a little thing, and to question it is

to go further than justice permits. If all of the water of Silvies river is a little thing, we are willing to concede this criticism; if the lands of complainant and their wants are a little thing, we are willing to concede this criticism. But we still intend to take the position that our lands and our rights are just as much entitled to protection as the rights of W. D. Hanley. Not only this, but the court goes further and says that the defendant W. D. Hanley "has at all times been disposed to deal fairly with the appellee". This court, in its decision reported in 200 Fed. 468, held that

> "the provisions of the original decree have been evaded by both Hanley and Levens";

that

> "Hanley clearly violated the provisions of the original decree by subsequently constructing in the Drain Ditch a stop gate", etc.,

and that in diverting water through the Drain ditch he

> "has committed and does commit a clear violation thereof",

and beside those violations and contempts of court, the trial court had already held him guilty of contempt in various other particulars specified in the decree from which no appeal was even taken. Notwithstanding that decision of this court (dissented from, it is true, by Judge Gilbert), the court now gives an elaborate coat of whitewash to W. D. Hanley and says that at all times he has been disposed to deal fairly with the appellee, and all this is based on the statements of Hanley, held by the lower court to be entirely unsustained by the evidence. But not only this, the court proceeds to go on the supposition that if appellee had

known that W. D. Hanley was doing all of these things alone, this proceeding would not have been brought. In other words, the appellee sees the land of Luig irrigated by all of the water of the west fork of the river being turned onto the same in violation of the decree. It naturally draws the conclusion that this is not without the consent of Luig, but also being informed that Hanley was responsible for it, naturally proceeded against both, and now the court says that because the complainant was unable to prove that Luig was responsible that it would not have proceeded at all if it had known that Hanley alone did it. You might just as well say that because two men are proceeded against for murder and on the trial one of them admits the full responsibility that he should be acquitted and the proceeding dismissed because forsooth the prosecution was unable to establish a case against the one charged as a confederate, and you might just as well say that if the prosecution refused to take that position that it had gone further than justice permitted in proceeding at all. What difference does it make to the complainant if the water in violation of the decree is turned out of the west fork of the river onto the Luig land in violation of the decree whether it is done by Luig or by Hanley or anyone else who had knowledge of this decree? The complainant is not interested in who is violating this decree, but is interested in knowing whether it is violated, and it is deprived of the water and the water in violation of the decree is placed upon the land which is prohibited from using it. In the same way, the appellee saw the water by the Young dam in violation of

the decree turned onto the Thornberg and Hotchkiss land. It naturally assumed that Thornberg and Hotchkiss were cognizant of this and proved that to be a fact, but in that case Hanley took the other position and dodged responsibility and escaped punishment by testifying that he did not in fact take any water by means of the Young dam at all. Still the court says, which is absolutely contrary to the record, that the court found him guilty of contempt for using the Young dam. Here, again, we may have failed to prove all of the parties guilty of that particular offence, but those who were found guilty were adjudged guilty by the court, and the proper punishment meted out to them, and the lower court did not say because we had been unable to prove a case against all we therefore could get no relief against those who were guilty of the offence. But the court even takes advantage of the statement of the counsel for appellee to the effect that since he acquired knowledge of certain of the acts of Hanley while he was on the Hanley land at the invitation of Mr. Hanley he "felt a little reluctance about this matter of taking any proceedings on that matter at that time", and attempts to twist this into an admission that all of the things on the east fork would have been overlooked if it were not for the matters on the west fork. On the contrary, the record shows that immediately after counsel for the appellee learned of the conditions on the east fork, instead of immediately bringing such a proceeding, he took the matter up directly with the attorney for Mr. Hanley, Judge Webster (Typewritten Trans. p. 87), and this natural courtesy shown under the circumstances is

twisted by the court into a willingness on behalf of the appellee to allow unlimited quantities of water to be diverted by Hanley through the Drain ditch and through cuts in the bank of the river and to permit him to continue all kinds of obstructions in the river channel. We say that any one who would stand by with the admitted rights which this decree gives us and see the Luig land, the Thornberg land, the Hotchkiss land and the Hanley land taking all of the water of the river at the only time when the decree guaranteed the water to the complainant and do nothing to enforce his rights, would not be entitled to own any land or any right, nor to the respect of any person or any court, and we can not help but resent such a record as has been made in this case charging us with going further than justice permitted because we insist that our rights be respected and the decrees of the courts enforced and carried out.

The acts of Hanley which are shown by the record of this court to have been heretofore complained of by the appellee are as follows:

1. Shortly after the decree he cut the entire channel of the river away from appellee's land and constructed two solid dams across the channel, taking all of the water of the river away from appellee's land. These dams he was compelled to remove by the order of the court, which held that they were constructed in violation of the terms of the decree.

2. In 1906 he by means of dams turned a large part of the water of the river out into the sagebrush to the east of his property for some six miles where it was dumped into Poison creek slough and entirely away

from complainant's property. Judge Bean ordered the removal of the dam that caused that result.

3. At times of high water and at times of low water, and at times when complainant did not even have enough water for its stock, he diverted water through the Drain ditch, and this was held by this court to be a clear violation of the terms of the decree.

4. He conspired with Levens to evade the terms of the decree so as to take the water which Levens was entitled to divert down onto his section 31, and this was held by this court to be in violation of the decree, and an evasion of it.

5. In the teeth of the decree he constructed a stop-gate and an outlet gate in the Drain ditch for the purpose of irrigating his land, and this was held to be in violation of the decree, but notwithstanding this holding, the obstructions were not removed until a final decree was rendered by this court holding them to be in violation of the decree, and enjoining their removal.

6. The alleged violations of the decree involved in this proceeding have already been sufficiently reviewed, and we respectfully ask the court: In what one of the matters referred to above has the defendant W. D. Hanley "at all times been disposed to deal fairly with the appellee"?

Beside these matters there has been another matter the subject of friction between these parties. It appears to this court that Hanley is claiming the right to divert water out of the river and through the Drain

ditch because he claims that if it goes on down the river it will overflow the banks of the river and overflow his land, and still he has refused to make a proper and reasonable channel for the river down through his land and between his land and the complainant's land, although the complainant has time and again requested it to be done, and has, in fact, itself made a proper channel on its side of the river. Irrespective of any legal question, we ask this court if in this day and age it is considered to be dealing fair with a neighbor to say that you will take the water of the river away from him because if it comes down the channel it will overflow your land, when you are refusing to take the ordinary steps to improve the channel of the river by the construction of a proper levee, and thus prevent such overflow? Not only this, we showed on the hearing of this proceeding that we had not only offered to join in the construction of such a channel, but had offered to pay the expense that Hanley would be put to by reason of the construction of such a channel in the carriage of water from his other ditches to the land which would be thus reclaimed. He even denied on the stand that we had ever offered to do this, and we were able to produce the written letter to him offering to do this work for him. If this is a matter that this court deems it has a right to pass upon and say who has dealt fairly in the premises, we would like this court to answer the question: How anything could be more fair than that two adjoining owners of swamp land, which they are in duty bound to reclaim, should join together to reclaim them by the construction of a proper channel for

the river between them? And what could be more fair than the offer of one of those owners to pay all of the expense to the other owner which would be caused by being compelled to artificially irrigate his land rather than relying upon the natural irrigation of it by overflow, particularly when he himself is claiming that the natural overflow is such a detriment that by reason thereof he can take all of the water of the river away from his neighbor? And still this court says that the defendant has dealt fairly, and that the complainant has not proceeded in accordance with justice.

CONCLUSION.

In concluding this petition we respectfully submit that on the merits the decision rendered herein is based on fundamental misconceptions of the record in this case, in the following particulars:

1. So far as the Luig dam was concerned, in the year in question, it was used in violation of the decree for the irrigation of the Luig land.

2. The assumption that the complaint in the original suit only referred to Hanley's right in the east fork of the river is without any foundation whatever.

3. The assumption that Hanley acquired any right or claims to have acquired any right in the Luig dam from Altschul has no support whatever in the record. Whatever right he has or claims to have he had at the time of the original decree.

4. The assumption that Hanley was held in contempt for using the Young dam is erroneous. The associates

of Young, Hotchkiss, and Thornberg were held in contempt for using it, as they clearly were, and Young was declared to have illegally constructed it, as he undoubtedly did, for the use of his land and was ordered to remove it.

5. The assumption that the trial court did not find that water was diverted into the Drain ditch when it was unnecessary to drain water from the lands of Hanley is directly contrary to the record.

6. The assumption that cuts in the bank of the river diverting fifty cubic feet of water were natural and properly left open is contrary to the testimony of two witnesses that they were artificial, and the testimony of the defendant that they had been and were controlled and closed by him.

7. The assumption that Mr. Griffing testified that the same amount of water flowed into the Hanley Upper ditch after the obstructions in the Twenty-one dam were removed as theretofore is based on a misapprehension of the record. He simply testified to the average flow during the entire period.

8. And finally we submit that the decision of this court acquitting Hanley of wrongs of which he has heretofore been found guilty by this court and by the District Court, and placing a stigma upon appellee for merely enforcing its rights as it conceives them in the courts established for that purpose, is unjust and should not be permitted to remain as a permanent record of this court.

We respectfully submit that a rehearing should be granted and that every charge on which the defendant was held to have violated the decree is sustained by the record in this case.

Dated, San Francisco,
July 24, 1916.

WIRT MINOR,
EDWARD F. TREADWELL,
Solicitors for Appellee and Petitioner.

CERTIFICATE OF COUNSEL.

I hereby certify that I am of counsel for appellee and petitioner in the above entitled cause and that in my judgment the foregoing petition for a rehearing is well founded in point of law as well as in fact and that said petition is not interposed for delay.

EDWARD F. TREADWELL,
Of Counsel for Appellee and Petitioner.